

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

EIJA HEWARD,)
Plaintiff,)
vs.)
CITY OF BROCKTON) C. A. No. 04-12038-JLT
BROCKTON PUBLIC SCHOOLS AND)
DONALD BURRELL, INDIVIDUALLY AND)
AS PRINCIPAL OF EAST JUNIOR HIGH)
SCHOOL, CITY OF BROCKTON,)
Defendants.)

MEMORANDUM IN SUPPORT OF
MOTION TO AMEND VERIFIED COMPLAINT

The Plaintiff in the above-entitled action filed her Complaint on September 22, 2004, and agreed to an extension for the Defendant, City of Brockton, to answer Plaintiff's aforesaid Complaint. The Defendant instead of filing an answer chose to file a Motion to Dismiss. In turn, the Defendant granted the Plaintiff an extension to file her opposition to said Motion to Dismiss until December 16, 2004, and said opposition is filed herewith this Motion to Amend Plaintiff's Verified Complaint and said opposition to the Motion to Dismiss is filed herewith along with this Motion to Amend Plaintiff's Verified Complaint. As part of her opposition to Defendant's Motion to Dismiss, Plaintiff filed a Motion to Amend her Verified Complaint accompanied by an Amended Verified Complaint, which deletes a number of counts reducing the Complaint to three counts for causes of action and narrows the issues addressed in the remaining three counts. (See Plaintiff's Amended Verified Complaint and Memorandum in Opposition to Defendant's Motion to Dismiss filed herewith).

The Plaintiff respectfully submits that she is entitled to as a matter of course under Fed. R. of Civ. P. 15(a) to amend her complaint, provided the amended complaint is filed prior to a responsive pleading having been filed. This Court has taken the position that a motion to dismiss is not a responsive pleading and that an amended complaint may be filed as a matter of course prior to the Court rendering a decision to grant a motion to dismiss.

The Court ruled in Keene Lumber Company v. Leventhal, et al, 165 F.2d 815 (1st Cir. 1948), (see Exhibit A, page 7, annexed hereto and made a part hereof), in which the Court said, "Rule 15A allows the amending of a parties pleading prior to entry of a dismissal as a matter of course" when the circumstances are as they exist in the present case before the Court.

In Keene Lumber Company v. Leventhal, *supra*, the Court said

"Rule 15A, Federal Rules of Civil Procedure, permits a party to amend his pleading 'once as a matter of course at any time before responsive pleadings is served.' We take it that a motion to dismiss is not a 'responsive pleading' within the Rule (United States v. Newbury Manufacturing Company, 1st Cir. 1941, 123 F.2d 453)".

The circumstances outlined by the Court in Keen, which would permit an amended complaint to be filed and accepted by the Court, are the same that exist in the instant case before the Court filed by the Plaintiff. In this instance, the Defendant having filed a Motion to Dismiss, said Motion has not been marked for hearing, nor decided as yet. Therefore, the Plaintiff should be permitted to file an amended complaint at this time.

There is no prejudice to the Defendant by allowing the Plaintiff's Motion for filing an Amended Complaint. In addition the Amended Complaint, as filed herewith,

will reduce the number of causes of action in the new complaint by reducing the number of counts from nine counts to three counts and also resolve the inadvertent error in numbering of counts in the original complaint filed previously.

Further, the remaining three counts have been narrowed and clarified with specific detail, which would permit the Plaintiff to go forward with discovery to gather the necessary evidence required to prove her claims.

WHEREFORE, the Plaintiff respectfully requests this Honorable Court to grant its Motion to Amend her Complaint and allow the filing of the Amended Complaint annexed hereto.

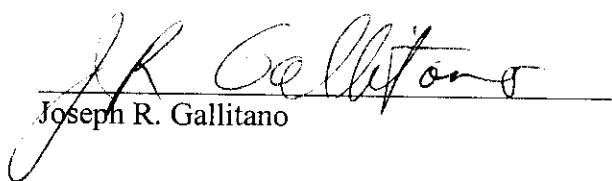
THE PLAINTIFF,
Eija Heward
By her attorney


Joseph R. Gallitano
34 Main Street Ext., Suite 202
Plymouth, MA 02360
(508) 746-1500
BBO # 183700

Dated: December 15, 2004

CERTIFICATE OF SERVICE

I, Joseph R. Gallitano, hereby certify that I have served the within document upon counsel of record this 15th day of December, 2004.


Joseph R. Gallitano